

**Letter of Findings Number: 04-20130504
Sales and Use Tax
For Tax Years 2011-12**

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ISSUE

I. Sales and Use Tax—Imposition.

Authority: [IC 6-2.5-2-1](#); [IC 6-8.1-5-1](#); [IC 6-2.5-5-8](#); [IC 6-2.5-8-8](#); *Brambles Industries, Inc. v. Indiana Dep't of Revenue*, 892 N.E.2d 1287 (Ind. Tax Ct. 2008); [45 IAC 2.2-8-12](#).

Taxpayer protests the imposition of sales and use tax.

STATEMENT OF FACTS

Taxpayer is a dealer of agricultural equipment with multiple locations in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of Indiana sales tax as a retail merchant for the tax years 2011 and 2012. The Department therefore issued proposed assessments for sales and use tax, and interest, for these tax years. Taxpayer protested that the Department's proposed assessments of sales tax were too high. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition.

DISCUSSION

Taxpayer protests a portion of the Department's proposed assessments of sales tax for the years 2011 and 2012. Taxpayer raises three specific issues:

- (1) Assessment of sales tax on sales transactions made exempt from sales tax by valid exemption certificates.
 - (2) Assessment of use tax on purchases of gasoline and diesel fuel purchased for resale and placed into the fuel supply tanks of new and used agricultural equipment.
 - (3) Assessment of use tax on television, newspaper, and internet advertising campaigns.
- Each issue will be discussed in turn.

A. Sales Tax on Exempt Transactions.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. [IC 6-2.5-2-1\(a\)](#). The Department assessed sales taxes on Taxpayer's sales of equipment. During the protest, Taxpayer presented ST-105 Exemption Certificates for two sales.

[IC 6-2.5-8-8\(a\)](#) describes sales tax exemption certificates:

A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax.

The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

The corresponding regulation reads as follows: "An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed." [45 IAC 2.2-8-12\(f\)](#).

Exercising its statutory authority, the Department created Form ST-105, Indiana General Sales Tax Exemption Certificate. Pertinently, Form ST-105 requires the issuer to provide the following information: name, address, date, account number, description of the property being purchased, basis for exemption, and a signature certifying that the property will be used for an exempt purpose.

Because Taxpayer presented two valid ST-105 Exemption Certificates, Taxpayer's protest is sustained on this issue with respect to sales to those two customers.

B. Use Tax on Fuel Placed into Supply Tanks.

As part of its business, Taxpayer purchased diesel and gasoline to place in tractors and other equipment, which were then sold to customers. Taxpayer provides additional fuel to satisfy its customers' expectations, and to ensure that the equipment can be unloaded and tested at the customers' location. Taxpayer does not, however, separately bargain with its customers for the additional fuel. In other words, Taxpayer does not charge its customers a higher or lower price based on the amount of fuel that Taxpayer places into the equipment.

Taxpayer asserts that it should not have to pay sales or use taxes on fuel that it places into equipment that is sold to customers. Taxpayer argues that the fuel should be subject to the resale exemption because, in Taxpayer's view, the fuel is part of the tangible personal property transferred to its customers. See [IC 6-2.5-5-8](#).

Taxpayer, however, is ineligible for the resale exemption because Taxpayer did not separately bargain with

its customers for the price of the fuel. See *Brambles Industries, Inc. v. Indiana Dep't of State Revenue*, 892 N.E.2d 1287 (Ind. Tax Ct. 2008) . In *Brambles*, a manufacturer sought the "resale exemption" for pallets by maintaining that "the price of pallet was incorporated into the price of their products." The Tax Court denied the exemption:

Indiana Code 6-2.5-5-8 exempts from tax "[t]ransactions involving tangible personal property ... if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business [.]" Ind. Code Ann. 6-2.5-5-8(b) (West 2001) (amended 2003). See also 45 Ind. Admin. Code 2.2-5-15(a) (2001). This Court has previously explained that in order to show entitlement to the sale for resale exemption, the taxpayer must demonstrate that it received itemized consideration for the item. See *Miles, Inc. v. Indiana Dep't of State Revenue*, 659 N.E.2d 1158, 1165 (Ind. Tax Ct.1995) (discount coupons inserted in boxes were not resold because customers did not pay itemized amount for them); *Indiana Bell Tel. Co. v. Indiana Dep't of State Revenue*, 627 N.E.2d 1386, 1389 (Ind. Tax Ct.1994) (telephone directories, the cost of which was built into customers' monthly bills, were not resold for purposes of the exemption because their cost was not itemized in the bills); *USAir, Inc. v. Indiana Dep't of State Revenue*, 542 N.E.2d 1033, 1035-36 (Ind. Tax Ct.1989) (holding that meals provided on airline's flights were not resold because there was nothing in the price of the ticket to reflect the price of the food). "Moreover, separate bargaining must occur between the customer and the taxpayer for the exchange of that particular item." *Miles*, 659 N.E.2d at 1165 . See also *Greensburg Motel Assocs. v. Indiana Dep't of State Revenue*, 629 N.E.2d 1302, 1305-06 (Ind. Tax Ct. 1994) (holding that consumable and non-consumable items provided in hotel guest rooms were not resold because the hotel's customers did not bargain for those items).

Brambles, 892 N.E.2d . at 1289-90 .

For these reasons, the fuel does not qualify for the resale exemption. Taxpayer is not selling the fuel because there is neither a separate itemized consideration nor separate bargaining for the fuel. Since Taxpayer did not pay sales tax at the time of the purchase of the fuel, use tax is properly imposed. As a result, Taxpayer has not met its burden to prove the proposed assessment wrong, as provided by [IC 6-8.1-5-1\(c\)](#).

Accordingly, Taxpayer's protest is denied with respect to this issue.

C. Use Tax for Advertising Costs.

Taxpayer paid for television, newspaper, and internet marketing. During the audit, the Department assessed use tax on these purchases. During the protest, however, Taxpayer provided invoices establishing that it purchased advertising services, rather than tangible personal property. Intangible advertising services are not subject to sales or use tax.

Accordingly, Taxpayer's protest is sustained with respect to this issue.

FINDING

Taxpayer's protest is sustained in part and denied in part. The protest is sustained with respect to the exemption certificates and advertising costs, but denied with respect to the use tax on fuel.

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